STATE OF MICHIGAN

COURT OF APPEALS

JOHN H. CASTELL and RABACCA S. SOSS-CASTELL,

Plaintiffs-Appellants,

v

PECKOVER METAL, COPPER AND BRASS SALES, THYSSENKRUPP MATERIALS, N.A., INC., VPK METAL, and KELLY SERVICES,

Defendants-Appellees.

UNPUBLISHED
August 22, 2013

No. 305648
Wayne Circuit Court
LC No. 09-006003-NO

Before: BOONSTRA, P.J., and SAWYER and MURRAY, JJ.

PER CURIAM.

Plaintiffs[1] appeal as of right from the circuit court order granting summary disposition in favor of defendant Kelly Services pursuant to MCR 2.116(C)(10), and, on reconsideration, granting summary disposition in favor of defendants Peckover Metal, Copper and Brass Sales, and VPK Metal pursuant to MCR 2.116(C)(7) (claim barred because of immunity). The trial court had previously granted summary disposition to defendant ThyssenKrupp Materials (TKM), also pursuant to MCR 2.116(C)(7). We affirm in part, reverse in part, and remand for further proceedings.

Plaintiff was employed by ThyssenKrupp Logistics (TK Logistics) as a truck/trailer driver and warehouseman. On March 29, 2006, plaintiff was injured while at a facility in Livonia where workers were loading his flat bed trailer with scrap metal. The facility was owned by Peckover Metal, which along with VPK Metal, had been acquired by TKM on March 17, 2006. The workers who were loading plaintiff's trailer were from Kelly Services, a temporary employment agency. The workers were there at the request of TKM or Copper and Brass Sales, which is a division of, and an assumed name for, TKM. According to plaintiff, the workers appeared that they "didn't have any clue on how to load this trailer." Plaintiff was injured when scrap metal that the workers had loaded onto the trailer fell on top of him.

[1] Because plaintiff Rabacca Soss-Castell asserts only a derivative claim for loss of consortium, the singular term "plaintiff" is used to refer to plaintiff John Castell only.

Plaintiff, an Ohio resident, filed a claim for and received worker's compensation benefits from the Ohio Bureau of Workers Compensation. Plaintiff also filed a claim for worker's compensation benefits in Michigan. Plaintiffs brought this separate action against defendants in circuit court. Plaintiffs alleged that John Castell's injuries were the result of inexperience by the forklift operator, "a damaged and inadequate forklift, a lack of proper banding material, and improper procedures utilized in securing metal to the truck."

The trial court granted summary disposition to TKM and, on reconsideration, to Peckover Metal, VPK Metal, and Copper and Brass Sales on the basis of the exclusive remedy provision of the Worker's Disability Compensation Act (WDCA), MCL 418.131(1). The court also granted summary disposition to Kelly Services, concluding that plaintiffs could not rely on alleged OSHA[2] or MIOSHA[3] violations to establish that Kelly Services owed plaintiff a duty of care, and that there was no evidence that Kelly Services retained control over the workers it supplied to the other defendants, so it could not be vicariously liable for the conduct of those workers.

I. TKM DEFENDANTS

The TKM defendants moved for summary disposition under MCR 2.116(C)(7), which provides that summary disposition may be granted when a claim is barred "because of . . . immunity[.]" The exclusive remedy provision of the WDCA "may be viewed as providing 'immunity' from suit." *Harris v Vernier*, 242 Mich App 306, 315; 617 NW2d 764 (2000). This Court reviews the grant or denial of summary disposition de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Additionally, "whether a business entity is a particular worker's 'employer,' as that term is used in the WDCA, is a question of law for the courts to decide if the evidence is reasonably susceptible of but a single inference." *Clark v United Technologies Auto, Inc*, 459 Mich 681, 693-694; 594 NW2d 447 (1999). We review questions of law de novo. *Harris*, 242 Mich App at 309. "Only where evidence of a putative employer's status is disputed, or where conflicting inferences may reasonably be drawn from the known facts, is the issue one for the trier of fact to decide." *Clark*, 459 Mich at 694.

Section 131 of the WDCA, MCL 418.131(1), states, in pertinent part:

> The right to the recovery of benefits as provided in this act shall be the employee's exclusive remedy against the employer for a personal injury or occupational disease.

The term "employer" is not defined in the statute, except to specifically include certain entities that are not pertinent here. MCL 418.131(2). *Clark*, 459 Mich at 687. The test for determining whether an entity is an "employer" for purposes of applying the exclusive remedy provision is the "economic realities test." *Id*. In *Clark*, our Supreme Court stated:

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[2] Occupational Safety and Health Act, 29 USC 651 *et seq*.

[3] The Michigan Occupational Safety and Health Act, MCL 418.1001 *et seq*.

> Although the totality of the circumstances are considered, in applying the economic realities test, the courts generally consider the following four factors "(1) [the] control of a worker's duties, (2) the payment of wages, (3) the right to hire and fire and the right to discipline, and (4) the performance of the duties as an integral part of the employer's business towards the accomplishment of a common goal." No one factor is controlling. [*Clark,* 459 Mich at 688-689 (citations omitted; bracketed material in *Clark*).]

Initially, we reject plaintiffs' argument that this Court need not examine the economic realities test because the TKM defendants admitted in their discovery responses that they are not plaintiff's employer, and that the trial court erred in concluding that the TKM defendants were not bound by their answers. The admissions cited by plaintiffs state that TKM, Peckover Metal, Copper and Brass Sales, and VPK Metal did not employ plaintiff. However, those answers were not provided in reference to the statutory exclusive remedy provision, and thus did not preclude the TKM defendants from arguing that they were entitled to the benefit of the exclusive remedy provision because of their relationship to TK Logistics. The entities' factual statements that they did not employ plaintiff did not waive plaintiffs' right to raise the legal argument that, based on the economic realities test, they were an "employer" within the meaning of the exclusive remedy provision of the WDCA.

Plaintiffs also argue that the trial court should not have considered the affidavit of James VanValkenburg, which was essential to the TKM defendants' motion for summary disposition, because the affidavit did not show that VanValkenburg had personal knowledge of the facts asserted in the affidavit, or that he could testify competently, as required by MCR 2.119(B)(1). In the affidavit, VanValkenburg averred that he was the Risk/Safety Manager for TKM and had investigated the matters identified in the affidavit and made the statements as TKM's representative. Even if plaintiffs could show that the affidavit was technically flawed, however, this Court may still consider it. Evidence submitted in support of a motion for summary disposition need only qualify as admissible in substance or content, if not in form. *Maiden,* 461 Mich at 124 n 6; *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 373; 775 NW2d 618 (2009). The fact that VanValkenburg learned of the entities' business relationships as they existed in 2006 through investigation does not mean that the content of the affidavit must be disregarded.

Plaintiffs further argue that because MCL 418.131(1) refers to "the employer" and not "an employer," only one business entity may be recognized as plaintiff's employer, and that entity is TK Logistics. Plaintiffs rely on decisions such as *Robinson v City of Detroit,* 462 Mich 439; 613 NW2d 307 (2000), concerning the significance of the Legislature's choice of the definite article "the," and assert that Supreme Court decisions recognizing that more than one entity may qualify as an "employer" entitled to the benefit of the exclusive remedy provision were wrongly decided and were effectively overruled by *Robinson*.[4] The argument that only one

[4] Plaintiffs cite *Kidder v Miller-Davis Co,* 455 Mich 25, 34-35; 564 NW2d 872 (1997), and *Farrell v Dearborn Mfg Co,* 416 Mich 267, 276; 330 NW2d 397 (1982).

entity can claim the protection of the exclusive remedy provision is not compatible with *Clark*, 459 Mich at 689, which explicitly recognizes that more than one corporate entity may rely on the exclusive remedy provision. "It is the Supreme Court's obligation to overrule or modify case law, and until it takes such action, the Court of Appeals and all lower courts are bound by that authority." *Pellegrino v AMPCO Sys Parking*, 486 Mich 330, 354 n 17; 785 NW2d 45 (2010).

Plaintiffs next contend that under MCL 418.161(1)(*l*), plaintiff is not an "employee" of the TKM defendants because his contract for hire was with TK Logistics. Plaintiffs would have this Court discard the economic realities test in favor of an approach that considers the interplay between the definition of "employee" in § 161(1)(*l*) and the meaning of "the employer" in § 131(1). In *Clark*, 459 Mich at 687-688 n 5, our Supreme Court noted that for purposes of the definition of "employee" in § 161, the economic realities test had been superseded by legislative enactment. The Court then discussed the economic realities test as it pertained to determining an employment relationship for purposes of the exclusive remedy provision. *Id*. at 687. Again, the approach that plaintiffs advocate is not compatible with *Clark*.

Plaintiffs further argue, however, that even if the economic realities test is applied, the TKM defendants did not show that they were entitled to summary disposition under that test. We disagree. In *Clark*, the Court explained that case law applying the economic realities test may be broadly divided into two categories. *Id*. at 689. One line of authority involves dual employers or co-employers. These cases "involve essentially a horizontal relationship between two business entities [which], if so warranted by the application of the economic realities test, can both claim employer status for purposes of the exclusive remedy provision." *Id*. at 690. *Clark* was a dual-employer case. *Id*. at 693. The second category of cases involves parent and subsidiary corporations. In those cases, "an essentially vertical relationship exists between two business entities [which], if warranted by the application of the economic realities test and the equities of the case, will be treated as essentially one entity for the purposes of the exclusive remedy provision. Thus, in these cases, if warranted, the separate existence of the two entities is disregarded." *Id*. at 691 (citations omitted). The result is in effect a "reverse-piercing" of the corporate veil. *Id*. at 690. In *Clark*, the Supreme Court identified *Wells v Firestone Tire & Rubber Co*, 421 Mich 641; 364 NW2d 670 (1984), as "the leading case in this area."

The thrust of the TKM defendants' arguments concerning the exclusive remedy provision concerns the interrelatedness of the entities. There was no evidence that TKM controlled plaintiff's duties in a manner other than as a customer of TK Logistics. TKM did not directly pay plaintiff's wages, although the processing of checks was from the TKM central office. The TKM defendants do not claim that they exercised the right to hire, fire, and discipline the employees of TK Logistics. However, the employee handbook for TK Logistics is the same as that for TKM. The "unity of policy" is a "feature" of cases in which the parent and subsidiary were treated as one for purposes of the exclusive remedy provision. *Verhaar v Consumers Power Co*, 179 Mich App 506, 509; 446 NW2d 299 (1989). With respect to the fourth factor, "the performance of the duties as an integral part of the employer's business toward the accomplishment of a common goal," this Court explained in *Verhaar*, 179 Mich App at 509, that two entities were integrally related because one performed field work, while the other supplied equipment. TK Logistics is a motor carrier, registered by the United States Department of Transportation for this purpose, and the TKM defendants are metal services companies. In *Wells*, 421 Mich at 649, as well as in *Clark*, 459 Mich at 694-696, the Court's analysis of the

economic realities test included discussion of the interrelatedness of the entities, which in some decisions is linked to the fourth factor. See *Howard v Dundee Mfg Co*, 196 Mich App 38, 42; 492 NW2d 478 (1992).

In *James v Commercial Carriers, Inc*, 230 Mich App 533, 539; 583 NW2d 913 (1998), this Court stated:

> A salient factor in determining an employee-employer relationship in the parent-subsidiary context is the use of a combined worker's compensation insurance policy by both parent and subsidiary. *Verhaar v Consumers Power Co*, 179 Mich App 506, 509; 446 NW2d 299 (1989). Combined bookkeeping and accounting, together with income tax treatment that regards the corporations as a single entity, has also been a persuasive factor in supporting the conclusion that two corporations should be treated as one for the purposes of the exclusive remedy provision. *Id*. "In some cases, the parent company has been directly responsible for hiring and firing, but in *Verhaar* and *Wells*, there was nothing more than unity of personnel policy." *Id*.

In their motion for summary disposition, the TKM defendants relied principally on VanValkenburg's affidavit as the primary source of information about the relationships between TK Logistics and the TKM defendants. According to the affidavit, TKM owns all of the stock of TK Logistics and of all of the other subsidiaries. TKM provides medical and health benefits under a single policy and includes TK Logistics and other subsidiaries. The TKM 401(k) plan applies to TK Logistics and other subsidiaries. TKM fringe and benefit plans are the same and include all of the subsidiaries, including TK Logistics. The W-2 and other tax forms are processed from a centralized payroll department for TKM and its subsidiaries. TKM also has a central accounting office that performs all of the accounting for its subsidiaries including TK Logistics. TKM processes and issues all checks from its Southfield location, including those for its subsidiaries, such as TK Logistics. TKM has an annual consolidated financial statement that includes the reporting of its subsidiaries. The subsidiaries benefit from the shared services of TKM, including information technology, human resources, safety, benefits, and executive management, and the costs are shared. TKM's property and casualty insurance policies name the subsidiaries, such as TK Logistics, as insureds. The personnel records for employees of TKM and of the subsidiaries are kept and administered at the TKM offices in Southfield. In addition, the TKM employee handbook is the same one used for the subsidiaries.

Plaintiffs emphasize that VanValkenburg's deposition testimony supports their contention that TK Logistics is separate from the TKM defendants. Plaintiffs also note that TK Logistics has a separate federal tax identification number, that TKM kept separate books for each business entity for employee benefits, and that the board of directors for the entities did not entirely overlap.

We conclude, however, that the evidence establishes that TKM is entitled to the benefit of the exclusive remedy provision. In *Wells*, 421 Mich at 648-649, the Court recognized similarities in the way that the parent company (Firestone) treated the subsidiary corporation (Muskegon Firestone) and that the stores were merely retail divisions of Firestone. In the present case, the evidence shows that TK Logistics was treated in the same manner as TKM's Copper

and Brass Sales division. Although plaintiffs note that the central functions provided by TKM are allocated to the various entities, the same was true in *Wells*, 421 Mich at 649.

With respect to the TKM defendants other than TKM itself, the trial court, on reconsideration, granted them summary disposition because they are "simply divisions of the parent company doing business under assumed names[.]" We agree. Plaintiffs have not presented a persuasive basis for contesting the liability of the other TKM defendants.

Accordingly, we affirm the trial court's orders granting summary disposition to the TKM defendants.

II. KELLY SERVICES

The trial court granted summary disposition to Kelly Services pursuant to MCR 2.116(C)(10). Summary disposition may be granted under MCR 2.116(C)(10) when "there is no genuine issue of material fact, and the moving party is entitled to judgment . . . as a matter of law." As previously stated, this Court reviews a trial court's decision on a motion for summary disposition de novo. *Maiden*, 461 Mich at 118.

With respect to plaintiffs' theory that Kelly Services may be directly liable for supplying inadequately trained temporary employees, the trial court determined that Kelly Services did not owe plaintiff a duty of care. The trial court characterized plaintiffs' argument as asserting that violations of statutory and administrative rules under OSHA and MIOSHA "give[] rise to liability, imposing a duty in favor of third parties[,]" and held that imposition of a duty on that basis would be contrary to MCL 408.1002(2), which states:

> Nothing in this act [MIOSHA] shall be construed to supersede or in any manner affect any workers' compensation law, or to enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment.

Plaintiffs contend that the trial court misunderstood their position with respect to duty. We agree. Plaintiffs argued below, as they do on appeal, that Kelly Services had a common-law duty to use ordinary care in its undertakings, citing Restatement Torts, 2d, § 324A. Plaintiffs assert that Kelly Services undertook to provide hi-lo operators, did so negligently by providing inadequately trained operators, and that it thereby increased the risk of harm to foreseeable persons, including truck drivers such as plaintiff. Kelly Services did not offer below any basis for rejecting plaintiffs' assertion that it had a common-law duty to exercise reasonable care with respect to providing workers to the borrowing employer. Similarly, on appeal, Kelly Services does not address plaintiffs' assertion of a common-law duty, but merely insists that OSHA and MIOSHA do not create a duty to third parties. Although we agree that a MIOSHA violation does not invest an injured worker with a tort remedy, that determination is not dispositive of whether Kelly Services owed plaintiff a common-law duty of care in its undertaking to supply workers to a borrowing employer. Further, the mere fact that Kelly Services was under contract does not relieve it of "its preexisting common-law duty to use ordinary care in order to avoid

physical harm to foreseeable persons and property in the execution of its undertakings." *Loweke v Ann Arbor Ceiling & Partition Co, LLC*, 489 Mich 157, 172; 809 NW2d 553 (2011).

Because the trial court focused only on whether a MIOSHA violation could give rise to a duty of care and did not independently consider whether Kelly Services owed plaintiff a common-law duty of care in its undertaking to supply workers to a borrowing employer, and because Kelly Services has not advanced any argument for why such a duty does not exist and why it was entitled to judgment as a matter of law, we reverse the trial court's ruling with respect to plaintiffs' negligence claim based on a theory of direct liability and remand for further proceedings regarding that claim.

With respect to plaintiffs' claim premised on vicarious liability for the actions of its temporary workers at the facility, the trial court granted summary disposition because it concluded that Kelly Services had fully surrendered direction and control of the temporary workers to the other defendants. The trial court cited *Hoffman v JDM Assoc, Inc*, 213 Mich App 466, 468; 540 NW2d 689 (1995), and *May v Harper Hosp*, 185 Mich App 548; 462 NW2d 754 (1990), which quote *Janik v Ford Motor Co*, 180 Mich 557; 147 NW 510 (1914), for its discussion of the "control test." In *Janik*, our Supreme Court stated:

> A person who avails himself of the use, temporarily, of the services of a servant regularly employed by another person may be liable as master for the acts of such servant during the temporary service. The test is whether in the particular service which he is engaged or requested to perform he continues liable to the direction and control of his original master or becomes subject to that of the person to whom he is lent or hired, or who requests his services. It is not so much the actual exercise of control which is regarded, *as the right to exercise such control*. To escape liability the original master must resign full control of the servant for the time being, it not being sufficient that the servant is partially under control of a third person. Subject to these rules the original master is not liable for injuries resulting from acts of the servant while under the control of a third person. [*Id.* at 562 (emphasis added).]

Plaintiffs' argument on appeal focuses on the lack of supervision at the worksite and uncertainty concerning who was in charge. However, plaintiffs do not identify any evidence that suggests that Kelly Services retained control over the employees. The extent to which the borrowing employer actually or adequately exercised control is immaterial. In the absence of any evidence that Kelly Services retained control over the employees, the trial court did not err in granting summary disposition with respect to plaintiffs' vicarious liability claim. Plaintiffs failed to establish a genuine issue of material fact concerning Kelly Services's vicarious liability for the workers it supplied to the TKM defendants.

In summary, we affirm the trial court's orders granting summary disposition to the TKM defendants, affirm the trial court's grant of summary disposition to Kelly Services with respect to plaintiffs' negligence claim premised on vicarious liability, but reverse the trial court's grant of summary disposition to Kelly Services with respect to plaintiffs' negligence claim premised on direct liability based upon common-law negligence and remand for further proceedings regarding that claim.

Affirmed in part, reversed in part, and remanded for further proceedings. We do not retain jurisdiction. No costs.

/s/ Mark T. Boonstra
/s/ David H. Sawyer
/s/ Christopher M. Murray